Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-753

UNITED STATES OF AMERICA, *Petitioner*

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI,
Respondents

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

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BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States
Court of Claims

OPINION BELOW

The opinion of the Court of Claims is reported at 499 F.2d 690, 205 Ct.Cl. 330 (1974).

STATUTE AND RULES INVOLVED

Public Law 92-415, 86 Stat. 652:

AN ACT

To amend title 28, United States Code, section 1491, to authorize the Court of Claims to implement its judgments for compensation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the first paragraph of section 1491 of title 28, United States Code, is amended by adding thereto the following:

"To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

SEC. 2. This Act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

Approved August 29, 1972.

Court of Claims Rule 131(c)(1)(2):

(c) *Separate Determination of Liability:* (1) stipulation of the parties, subject to approval by the commissioner, or upon order of the commissioner, a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings.

(2) In any case, whether or not a stipulation or order has been made under subparagraph (1) of this paragraph (c), the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. In such event, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 151 and 152. Upon the entry of any such final judgment on the right to recover, the commissioner shall proceed with the determination of the amount of recovery. The parties may be allowed

a reasonable time within which to stipulate or otherwise agree upon a computation. (*Cf.* Rule 75.) If the parties are unable to agree on the amount of recovery, this issue shall be disposed of in accordance with the rules covering pretrial procedures, trial, exceptions, briefs, and argument.

Court of Claims Rule 149(a) and (b):

(a) Issuance of Remand Order: At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official, with such direction as may be deemed proper and just.

(b) Content of Remand Order: An order of remand shall (1) delineate the area of further consideration or action deemed warranted on the remand, and (2) fix the extent to which, and the duration of the period (not to exceed 6 months) during which, court proceedings shall be stayed.

QUESTIONS PRESENTED

1. Has not the Court of Claims jurisdiction over Respondents' claims?

2. Having jurisdiction, was not the Court of Claims authorized to remand the case to the Civil Service Commission with proper directions?

STATEMENT

Respondents, trial attorneys in the office of counsel, Defense Personnel Support Center, Defense Supply Agency, represent the Government in appeals brought before the Armed Services Board of Contract Appeals. The respondents have contended throughout this proceeding, first, that their positions are independently entitled to classification GS-905-14 by application of the standards expressed in General Attorney Series GS-905-0 and, second, that their positions are substantially identical to those held by trial attorneys at the Contract Appeals Division, Office of Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio. The respondents are trial attorneys representing the Government in appeals brought before the Armed Services Board of Contract Appeals under the Disputes article found in all Government contracts.

The Armed Services Board of Contract Appeals serves under the standard contract disputes clause as the authorized representative of the Secretaries of Defense, Army, Navy, and Air Force, to hear and determine appeals from contracting officers' decisions on disputes arising out of contracts between defense agencies and Government contractors. The contractors may represent themselves or retain counsel. The Government is represented by counsel from the procurement directorate of the defense component which entered into the particular Government contract, and respondents represent the Government before the Armed Services Board of Contract Appeals in all appeals originating out of Defense Personnel Support Center contracts.

The Defense Personnel Support Center, Office of Counsel-trial section, consisted of respondents at Grade GS-905-13. Cases are assigned to respondents on a random basis.

At the Air Force Logistics Command there was a director, a deputy director, and three divisions of trial

attorneys. The six civilian trial attorneys comprise two graded GS-905-15, three graded GS-905-14, and one graded GS-905-13. The two GS-15's are called senior trial attorneys who handle the most difficult and complex cases. The three GS-14's are subject to the division chief 's administrative supervision but receive no direct professional supervision. The one GS-13 receives both administrative and professional supervision from the division chief.

The position descriptions at the Defense Personnel Support Center and at the Air Force Logistics Command are strikingly similar; the major responsibility being preparation and execution of a trial of an appeal before the Armed Services Board of Contract Appeals. Whereas the Air Force Logistics Command GS-15 is for "most difficult and most important cases," respondents handle any type of case at the Defense Personnel Support Center, without preselection. Whereas at the Air Force Logistics Command the GS-14 attorneys handle the cases remaining after the "most difficult" have been selected out for the GS-15's, there is no appreciable difference between a comparison of respondents' position descriptions GS-905-13, with the corresponding position descriptions GS-905-14 at the Air Force Logistics Command, other than that respondents also handle the "most difficult" cases. Both require the trial attorney to conduct pretrial proceedings, prepare and file all necessary legal papers, review and evaluate the facts, participate in pretrial hearings, conduct legal research, interview and select factual and expert witnesses, brief and argue all motions, represent the Government at trial, using techniques and legal theories based on their own independent judgment, submit post trial briefs, determine whether and when a case is appropriate for settlement, and, if it is, to negotiate and execute such settlements.

The differences between the positions descriptions are insignificant. The Air Force Logistics Command GS-905-14 position includes the furnishing of legal advice to contracting officers on decisions rendered before an appeal is taken, and the respondents, as the record shows, perform

that pretrial function also. Respondents' position descriptions also mention reviewing Armed Services Board of Contract Appeals' decisions to determine whether reconsideration motions should be filed (App. 48).

It was the trial judge's decision that if there were any differences between the position descriptions, they favored the respondents (App. 48).

The basis for classification under the General Attorney Series is to evaluate two factors: the difficulty of the work assignments, and the degree of responsibility. This evaluation involves a comparison of the position description wording against The General Attorney Series wording. The position descriptions for grade GS-14 at both the Defense Personnel Support Center and the Air Force Logistics Command are virtually the same. The Trial Judge's review of the factors and the series aptly demonstrate respondents' entitlement to grade GS-905-14 (App. 49-54).

As the trial judge states (App. 54), when one has finally navigated the seas and shoals of words and phrases represented by the General Attorney Series and the position descriptions, the simple fact remains that respondents are responsible for performing as trial attorneys for the Government before the Armed Services Board of Contract Appeals; handling cases assigned without discrimination as to their relative difficulty or complexity, including the "most difficult." All appeals heard by the Board originate out of Defense Department contracts governed by the same basic procurement statutes, regulations, and standard contract forms and clauses. The Board's rules apply to all appeals docketed, and opinions resulting from respondents' efforts are eligible for citation in any Armed Services Board of Contract Appeals brief.

The particular commodity being procured by the Government is of relatively little importance in evaluating the difficulty and complexity of the case since legal precedents are blind to the subject matter of the contract (App. 54) and, in any event, the Defense Personnel Support Center procures food, clothing and medical supplies throughout

the Defense Department as well as to other non-defense Federal departments. The trial judge points out that the differences in grade more readily reflect attitude and the aptitude of the classifier in the art of hyperbole, and some classifiers read the same words differently than others (App. 55).

Respondents instituted this suit in the United States Court of Claims claiming entitlement to reclassification as Trial Attorneys GS-905-14 and the recovery of back pay as Trial Attorneys GS-905-14 since May 8, 1970 (App. 10, 11).

Under the General Attorney Series, positions are rated on the basis of two factors: difficulty of work assignments and the degree of responsibility. The trial judge of the Court of Claims ruled that there was essentially no difference between Trial Attorneys from the Air Force and the Trial Attorneys from the Defense Personnel Support Center, and that their positions could be interchanged without any problem arising. He determined that the respondents were entitled to classification GS-905-14 and found the decision of the Civil Service Commission to be arbitrary and capricious.

The Court of Claims heard the case *en banc* and a per curium opinion adopted by Cowen, Chief Judge, Davis, Nichols, Kashiwa, Judges, ruled that the position of the Civil Service Commission was arbitrary and capricious; that there was no iron rule that the Court of Claims could not ever award the pay of a higher position to the incumbent of a lower one where the action complained of was arbitrary and capricious and not supported by substantial evidence, and remanded the case to the Civil Service Commission pursuant to Public Law 92-415, 86 Stat. 652, and Rule 149(b) to conduct further proceedings consistent with the Court's decision to insure that the mandate of the statute, 5 U.S.C. 5101, calling for equal pay for equal work, was being complied with, so that the findings of the Agency, if newly and correctly made, would create a legal right which the Court of Claims could then enforce by a money judgment.

SUMMARY OF ARGUMENT

The Court of Claims has jurisdiction of the Respondents' claims since the Respondents are entitled to recover back pay since the action of the Civil Service Commission was arbitrary and capricious and not supported by substantial evidence and it is not necessary for the jurisdiction of the Court of Claims that the statute provide for a cause of action for compensation.

It has also been established that the Court of Claims, having jurisdiction, was authorized to remand the case to the Civil Service Commission with proper directions, that is, so as to make an adequate record, the Commission to report what, if any, discrepancy was between the Respondents' positions and the positions of the Air Force trial attorneys before the Armed Services Board of Contract Appeals, and so that the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. § 5101, calling for equal pay for equal work, was being complied with.

ARGUMENT

1. The Court Of Claims Had Jurisdiction Over Respondents' Claims.

The Court of Claims ruled in *Testan v. United States* (Pet. App. A, pp. 2a, 3a, 499 F.2d 690, 691 (1974):

> "We agree that the position of the CSC was arbitrary and capricious. Plaintiffs' case is built mainly on the classification of attorneys doing similar work for another agency. Plaintiffs try cases before the Armed Services Board of Contract Appeals (ASBCA). The comparison attorneys do so also, on behalf of the Air Force Logistics Command (AFLC) at Dayton, Ohio. The Commission flatly refused to consider them or their jobs. Ordinarily, we agree, it is not arbitrary and capricious to refuse to consider the grade of employees other than the one complaining. This case is peculiar in its facts. Where, as here, employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees, we deem the case to be different. There may be a perfectly good explanation for the apparent discrepancy. We think as a reviewing court we are entitled to be informed by the CSC what it is, and not to have to take it on faith or speculate about it. Otherwise, we are in no position to assure ourselves that the mandate of the statute, 5 U.S.C. §5101, (calling for equal pay for equal work), is being complied with. As the trial judge observes, the classification of lawyers is always difficult because of the spate of vague, subjective terminology in lawyer's job descriptions. We think, in the circumstances here involved, the grades of other lawyers representing other procuring agencies before the ASBCA provide an essential benchmark. Without consideration of them,

or at least some of them, no confidence can be felt that the statute has been obeyed.

"There is no iron rule that we cannot ever award the pay of a higher position to the incumbent of a lower one. We do that in *Selman v. United States*, 204 Ct.Cl. (decided June 19, 1974). *Compare, also, Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971). The question always is as to legal entitlement to the higher position. If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion. *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971); *Pettit v. United States*, 203 Ct.Cl. 207, 488 F.2d 1026 (1973). Here, as in *Pettit*, a remand under Pub. L. 92-415 affords the opportunity to employ the authority having the statutory discretion, to exercise it under proper directions. In *Bookman v. United States*, 197 Ct.Cl. 108, 453 F.2d 1263 (1972), we scrutinized the function of the CSC in classifying Government positions. We decided it was discretionary and not subject to our review except for arbitrary and capricious action or lack of support for a decision by substantial evidence. We adhere to that standard here. The theory of *Allison* and *Pettit*, however, was that the findings of the agency endowed with the discretion, if newly and correctly made, could create a legal right which we could then enforce by a money judgment. We did not consider our decisions therein to be merely declaratory, and neither is this one today.

"It is unnecessary to construe the Back Pay Act, 5 U.S.C. §5596, since, if it does not cover the situation here involved, neither does it limit the Tucker Act jurisdiction 28 U.S.C. §1491, as it previously existed. It was so held in *Allison* and *Pettit, supra*. Defendant would in effect refuse any judicial review to a person perhaps denied equal pay for equal work in a job classification, in possible violation of 5 U.S.C. §5101. When Congress desires to achieve this result, it knows

how to do it. *See, Chambers v. United States*, 196 Ct.Cl. 186, 451 F.2d 1045 (1971).

"In accordance with the foregoing, we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the plaintiffs to Grade GS-14.

* * *

"ORDERED, as follows: The case is remanded to the CSC pursuant to Pub. L. 92-415, 86 Stat. 652, and the court's General Order No. 3 of 1972* implementing such statute, for it to conduct further proceedings consistent with this order. . . ."

*[General Order No. 3 has now been rescinded and replaced by new Rules 149 and 150 (see p. 3 *supra*)].

In *Odian v. United States*, 203 Ct.Cl. 306 (1973), the Court of Claims said at 322:

> "Section 101 of the Classification Act of 1949, ch. 782, 63 Stat. 954 [5 U.S.C. §5101 (1970)], provides in part:
>
> 'It is the purpose of this chapter to provide a plan for classification of positions and for rates of basic compensation whereby—
>
> '(1) In determining the rate of basic compensation which an officer or employee shall receive, (A) the principle of equal pay for substantially equal work shall be followed * * *.'
>
> ". . . It is clear from the language of the section, however, that Congress intended only that employees

doing the same level of work be paid the same basic rate of compensation. To achieve this end, Congress appears to have established an organized system for classifying positions by grade, based upon the nature of the work, the qualifications required, and the varying levels of difficulty and responsibility. In Title VI of the Act, Congress established 'Basic Compensation Schedules' including the General Schedule (GS) which was divided into grades one through 18. Each grade represents a different level of difficulty and responsibility. The 'rate of basic compensation' in section 101 clearly refers to the grade level within the basic compensation schedule. Employees working at the same levels of difficulty and responsibility (but in different jobs) are to be assigned the same grade and therefore to be paid in accordance with the same basic rate of compensation."

Clearly, these decisions are correct since in *Selman v. United Sates*, 204 Ct.Cl. 675, 498 F.2d 1354 (1974), the plaintiffs there claimed entitlement to Rear Admiral (lower half) pay for their services as Assistant Judge Advocates General of the Navy while occupying only the rank of Captain, and the Court of Claims ruled that the plaintiffs were entitled to the rank of Rear Admiral (lower half) pay and remanded the case for determination of the amount of recovery pursuant to Rule 131(c). In *Greene v. United States*, 376 U.S. 149, 153 (1964), the Court of Claims, applying the doctrine of exhaustion of administrative remedies, ordered proceedings "suspended pending pursuit of administrative remedies [made available] by the Department of Defense." And see *Kreznar & Spector v. United States*, 376 U.S. 221 (1964). In *Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971), the Court of Claims in a suit by faculty members of the Merchant Marine Academy ruled that they were entitled to a higher rating and granted the plaintiffs' motion for summary judgment and suspended proceedings to enable the Maritime Administration officials to consider the faculty members' request. In *Allison v.*

United States, 196 Ct.Cl. 263, 451 F.2d 1035 (1971), the Court of Claims considered Wage Board employees in a back pay case where the Board of Appeals and Review of the Civil Service Commission had determined the Wage Board employees not to be entitled to recovery, and suspended proceedings to allow the Wage Board employees:

> ". . . to apply for administrative findings which shall show, person by person, whether such person would have been promoted, when, and to what grade or grades, in light of such person's qualifications, the qualifications of competitors, the existence of vacancies, the availability of funds, and all other factors that would have properly influenced the exercise of discretion in the making of an actual promotion at the time a promotion was due. *Cf. Drucker v. United States*, 195 Ct.Cl. 335, 451 F.2d 619 (1971)."

In *Drucker v. United States*, 195 Ct.Cl. 335, 451 F.2d 619 (1971), the Court of Claims was again concerned with faculty members of the Merchant Marine Academy and the Court of Claims ruled them entitled to recover, suspending further action so that proper officials of the Maritime Administration might consider the category into which the faculty members were entitled to be placed.

The action of the Court of Claims in granting a judgment on the issue of liability, leaving for further determination the amount of damages when a new judgment is entered in such amount, is well established: *Caltex (Philippines), Inc. v. United States*, 120 Ct.Cl. 518, 100 F.Supp. 970 (1951), where the Court of Claims held plaintiffs entitled to recover for the taking of the terminal facilities and the petroleum products, with the exact amounts being reserved for further proceedings.

In *Central Eureka Mining Co. v. United States*, 134 Ct.Cl. 1, 53, 138 F.Supp. 281, 310 (1956), the Court of Claims ruled that the plaintiffs there had established their right to recover just compensation for a temporary taking of their gold mining properties, and remanded the cases

to a Commissioner of the Court of Claims for trial on the question of damages. This action was recognized and approved by the Court in *United States v. Caltex*, 344 U.S. 149 (1952), as well as in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

Petitioner contends to the Court that the Classification Act and the Back Pay Act of 1966 do not grant any action to the Respondents for back pay. But the Court of Claims in *Chambers v. United States*, 196 Ct.Cl. 186, 194, 451 F.2d 1045, 1050 (1971) said:

> "There is nothing novel about this court affording a monetary remedy to claimants on the strength of Executive Orders and administrative regulations not expressly so providing. Under the doctrine of *Service v. Dulles*, 354 U.S. 363 (1957), we have many times awarded back pay to plaintiffs, both military and civilian, who demonstrated a violation of procedural rights guaranteed to them by valid departmental regulations. *Glidden v. United States*, 185 Ct.Cl. 515 (1968); *Fletcher v. United States*, 183 Ct.Cl. 1, 392 F.2d 266 (1968); *Greenway v. United States*, 175 Ct.Cl. 350 (1963), *cert. denied*, 385 U.S. 881, *reh. denied*, 385 U.S. 954 (1966); *Daub v. United States*, 154 Ct.Cl. 434, 292 F.2d 895 (1961); *Starzec v. United States*, 145 Ct.Cl. 25 (1959); *Watson v. United States*, 142 Ct.Cl. 749, 162 F.Supp. 755 (1958). In *Watson*, the court noted at 756, 162 F.Supp. at 758:
>
> "* * * that neither Service nor Watson was claiming a violation of any procedural rights guaranteed by any statute whatever, but rather the violation of rights guaranteed by departmental regulations. If the regulations issued under the executive orders, which in turn were issued under the 1883 Civil Service Act, in the case of *Service* had the force and effect of law, and a discharge carried out contrary to the provisions of these regulations was therefore an

> invalid discharge, it is difficult to understand why the Watson discharge in violation of another regulation issued under the same 1883 Act, was not equally invalid.' "

In *Daub, supra*, the Court noted 154 Ct.Cl. at 437-38, 292 F.2d at 897-98:

> "The Government points out that the plaintiff was a temporary employee who had no status either in the competitive civil service, or as a veteran. But, as we have shown, the Army had, by regulation, conferred upon its employees, including its employees who had no rights under the Lloyd-LaFollette Act or the Veterans' Preference Act, the right to prescribed rational and uniform treatment with regard to their status as employees. * * *

In *Simon v. United States*, 113 Ct.Cl. 182, 190-91 (1949), the court said:

> "* * *. It is not necessary, to the jurisdiction of this court to render a money judgment based upon rights conferred, that the statute, contract, or regulation upon which the claim is founded contain a provision that denial of a legal right thereunder shall give rise to a cause of action for compensation or damages. This matter is taken care of by the broad jurisdiction conferred by §1491, U.S.C., Title 28, *supra*. *United States v. Wickersham*, 201 U.S. 390."

There is a further reason for the Court of Claims having jurisdiction of this case viz. discrimination against Respondents. In *Chambers v. United States*, 196 Ct.Cl. 186, 451 F.2d 1045 (1971), the Court of Claims was concerned with racial discrimination. Here, discrimination is between the Air Force Logistics Command trial attorneys on the one hand, and the Defense Personnel Support Center trial

attorneys on the other hand. The Court of Claims in the *Chambers* case ruled that the Executive Order providing equal opportunity and prohibiting discrimination because of race, provided a legal basis for awarding back pay to an *applicant* for Federal employment.

A violation of procedural rights guaranteed by valid departmental regulations entitles Respondents to claim back pay: *Service v. Dulles*, 354 U.S. 363 (1957); *Glidden v. United States*, 185 Ct.Cl. 515 (1968); *Fletcher v. United States*, 183 Ct.Cl. 1, 392 F.2d 266 (1968); *Greenway v. United States*, 175 Ct.Cl. 350 (1963), *cert. denied*, 385 U.S. 881, *reh. denied*, 385 U.S. 954 (1966); *Daub v. United States*, 154 Ct.Cl. 434, 292 F.2d 895 (1961); *Starzec v. United States*, 145 Ct.Cl. 25 (1959); *Watson v. United States*, 142 Ct.Cl. 749, 162 F.Supp. 755 (1958).

This is not the issue of a claimant seeking the pay of a higher paid position because he performs the duties of such position as in *United States v. McLean*, 95 U.S. 750 (1877); *Amundson v. United States*, 128 Ct.Cl. 80, 120 F.Supp. 201 (1954); *Price v. United States*, 112 Ct.Cl. 198, 80 F.Supp. 542 (1948); and *Dvorkin v. United States*, 101 Ct.Cl. 296, *cert. denied*, 323 U.S. 730 (1944). *See also, Ganse v. United States*, 180 Ct.Cl. 183, 376 F.2d 900 (1967).

As the Court of Claims pointed out in *Chambers v. United States, supra*, since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the distinction between discretionary acts and ministerial acts has been recognized. But even as to discretionary acts, an administrative officer might exceed his authority by making a determination which is arbitrary or capricious or unsupported by evidence: *Dismuke v. United States*, 297 U.S. 167, 172 (1936), and that standard has been used in back pay cases: *Blackmar v. United States*, 173 Ct.Cl. 1035, 354 F.2d 340 (1965). The Court of Claims ruled that the plaintiff *Chambers* was entitled to recover back pay from March 17, 1967, the date when she should have been hired, until March 9, 1970, the date she was employed, less any amounts she might have earned in the interim.

It is submitted that that is this case. There is in law no difference between types of discrimination, whether it be race, color, religion, sex, or national origin, or between the Air Force Logistics Command trial attorneys and the Defense Personnel Support Center trial attorneys.

And see *Small v. United States*, 200 Ct.Cl. 11, 470 F.2d 1020 (1972); *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971).

In the concurring opinion by Judge Davis, *Chambers v. United States, supra*, 196 Ct.Cl. at 203, 451 F.2d at 1055, it was pointed out that the substantial evidence was that the plaintiff *Chambers* had been discriminated against, and in this case the trial judge has found that the plaintiffs here have been discriminated against (App. 57).

Price v. United States, 112 Ct.Cl. 198, 80 F.Supp. 542 (1948), is cited in *Chambers v. United States, supra*, 196 Ct.Cl. at 196, 451 F.2d at 1051, for the principle that one cannot sue for a salary of a position which was never held although the claimant performed the duties of that position. *Coleman v. United States*, 100 Ct.Cl. 41 (1943), is similarly distinguished in *Chambers v. United States, supra*, 196 Ct.Cl. at 196, 451 F.2d at 1051, as is *Dvorkin v. United States*, 101 Ct.Cl. 296, *cert. denied*, 323 U.S. 730 (1944), and likewise *Ganse v. United States*, 180 Ct.Cl. 183, 376 F.2d 900 (1967), and similarly *Tierney v. United States*, 168 Ct.Cl. 77 (1964). *Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971), concerned *ex parte* statements considered in the administrative decision and action taken in contravention of established regulations contrary to *Camero v. United States*, 170 Ct.Cl. 490, 345 F.2d 798 (1965), and *Service v. Dulles*, 354 U.S. 363 (1957). *Nordstrom v. United States*, 177 Ct.Cl. 818 (1966), is cited in *Jarett v. United States, supra*, 195 Ct.Cl. at p. 329, for the statement: "Plaintiff is not seeking a promotion—he is seeking the benefits incident to a reclassification, an automatic action which applied to everyone." Accordingly the cases cited by petitioner in its brief at 18, are nc authoritative here. This case is ruled by *Chambers v.*

In *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971), the Court of Claims pointed out that in *Chambers v. United States, supra*, it had decided that the Executive Orders there cited provide authority for awarding back pay in racial discrimination cases, but that it was not necessary to consider whether the Back Pay Act, 5 U.S.C. §5596, also provides a remedy. It is submitted that the Back Pay Act does so provide in this case since Respondents here complain that they *have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay* of a trial attorney GS-14, since the Trial Judge has *concluded that the refusal to reclassify plaintiffs* [respondents] *to GS-14 is arbitrary, discriminatory, and is not supported by substantial evidence* (App. 57), and the first such refusal was on May 8, 1970 (App. 92). See *Walker v. Kleindienst*, 357 F.Supp. 749 (1973).

Accordingly, it must be concluded that the Court of Claims has jurisdiction over Respondents' claims.

2. The Court of Claims Having Jurisdiction Was Authorized to Remand the Case to the Civil Service Commission With Proper Directions.

What the Court of Claims did here was to remand the case to the Civil Service Commission pursuant to P.L. 92-415, 86 Stat. 652, and then General Order No. 3 of 1972 (now Rule 149(b)), consistent with the Court of Claims per curiam opinion. By such opinion the Court of Claims found the position of the Civil Service Commission to be arbitrary and capricious and that the Civil Service Commission should comply with the mandate of the statute 5 U.S.C. §5101, calling for equal pay for equal work. The Court of Claims having found the grades of other lawyers representing other procuring agencies before the Armed Services Board of Contract Appeals, to provide an essential

bench mark and further that without consideration of them, no confidence could be felt that the statute had been obeyed.

We have demonstrated that the Court of Claims has jurisdiction. There can be no doubt that the Order of the Court of Claims was proper. The statute, 92-415, 86 Stat. 652, *supra*, provides:

> ". . . In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

Senate Report No. 92-1066, on P.L. 92-415, U. S. Code Congr. & Adm. News, 92nd Congress, 2d Sess., 1972, Vol. 2, pp. 3116, 3120, reads on Sectional Analysis, as follows:

> "The second new sentence gives the Court of Claims the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just. The act thus provides the Court of Claims the necessary means to compel administrative or executive bodies to take further action where it is necessary to make an adequate record."

That is what the Court of Claims has done here. It has done no more nor less than the statute provides. It has remanded this case to the Civil Service Commission to take further action which the Court of Claims finds necessary to make an adequate record. It is found that as a reviewing Court the Court of Claims is entitled to be informed by the Civil Service Commission what the discrepancy is between Respondents' positions as Trial Attorneys before the Armed Services Board of Contract Appeals and the trial attorneys for the Air Force Logistics Command before the Armed Services Board of Contract Appeals. This is for the purpose of making an adequate record so that the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. §5101 calling for equal pay for equal work, is being

complied with, noting that the grades of other lawyers representing other procuring agencies before the Armed Services Board of Contract Appeals provide an essential bench mark.

Hence, the action of the Court of Claims in remanding the case to the Civil Service Commission was in accordance with the statute, 92-415, and followed the Sectional Analysis of the statute by Senate Report 92-1066.

CONCLUSION

It is respectfully submitted that it has been established that the Court of Claims has jurisdiction of the Respondents' claims and that under the statute, 92-415, 86 Stat. 652, since the case was within its jurisdiction, the Court of Claims had the power to remand the appropraite matters under the case to the Civil Service Commission with the directions which it gave *viz.* that the Civil Service Commission inform the Court as to what difference there was between the Respondents' positions as trial attorneys and the Air Force trial attorneys' practicing before the Armed Services Board of Contract Appeals so that an adequate record can be made and the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. §5101, calling for equal pay for equal work, was being complied with.

Accordingly this Court is requested to affirm the judgment of the Court of Claims.

Respectfully submitted,

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